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Get It On the Record

Practice and Procedure - When the judge calls you in for a chat, take the court reporter with you.

By Amy E. Margolin

The slogan "What happens in Vegas stays in Vegas" is also a good guideline for many aspects of civil litigation: client communications, settlement negotiations, and everything else meant to be kept confidential. But when it comes to protecting your client's interests in the event of an appeal, what you say and do in the courtroom should be put on the record.

From an appellate court's perspective, "if it is not in the record, it did not happen." (*Protect Our Water v. County of Merced*, 110 Cal. App. 4th 362, 364 (2003).) This judicial sentiment reflects one of the most basic principles of appellate practice: that all judgments and orders of the lower court are presumed to be correct. To win on appeal, you must affirmatively demonstrate that there has been an error. (See *Denham v. Superior Court*, 2 Cal. 3d 557, 564 (1970).)

It won't do any good to explain in an appellate brief what took place off the record, because matters outside the record "may not be considered by an appellate court upon the suggestion of counsel in their briefs." (*Ehman v. Moore*, 221 Cal. App. 2d 460, 463 (1963).)

Trial is where questions arise most frequently about what to do when proceedings take place off the record. This can occur for a variety of reasons--some deliberate, some inadvertent. But regardless of the circumstances, lawyers must exercise great caution. When no court reporter is present, unless you make a proper record the appellate courts will presume that no error occurred. The result, of course, may be profoundly adverse to your client. And no matter the issue and no matter the stakes, the error you allege will be unreviewable. For example, in one recent case the court of appeal rejected a challenge to a \$28 million judgment in part because the defendant did not make a sufficient record of an unreported jury-instructions conference held in chambers (*Bullock v. Phillip Morris, USA, Inc.*, 159 Cal. App. 4th 655, 677-79 (2008)).

Although there *is* a mechanism to cure gaps in the record on appeal after the fact, it is not fail-safe. In lieu of a reporter's transcript you may be able to use an agreed on or settled statement (see Cal. R. Ct. 8.120(b), 8.134, and 8.137), even when the oral proceedings were unreported (Cal. R. Ct. 8.137(a)(2)(B)). This enables parties to reconstruct important unreported events if necessary. (See, e.g., *Lipka v. Lipka*, 60 Cal. 2d 472, 480-81 (1963) (chambers conference).) But if the parties disagree about what took place, the trial court has broad discretion to decide the matter based on its own recollection, which might differ from that of the party trying to challenge an adverse ruling on appeal. The trial court's decision establishing the record will be final unless it is deemed to have acted arbitrarily. (See *People v. Hardy*, 2 Cal. 4th 86, 183 n.30 (1992); *Cross v. Tustin*, 37 Cal. 2d 821, 826 (1951); and *Burns v. Brown*, 27 Cal. 2d 631, 636 (1946).) Thus the most prudent course of action is to always make a record at the outset, and as contemporaneously as possible.

A few simple suggestions can help you chart this territory.

Make Sure There *Is* a Court Reporter

Of course, making a reported record will work only if a court reporter is present. But trial courts are not required to have court reporters on hand for every proceeding, and although courts often do provide them, no lawyer should automatically assume that one will always be present. Court reporters for civil proceedings function on demand. Therefore lawyers have a duty to ensure that a reporter is present whenever there is "reason to anticipate that what is said at a hearing may be pertinent to a subsequent appeal." (*In re Christina P.*, 175 Cal. App. 3d 115, 129 (1985).)

If the court normally does provide an official court reporter in all courtrooms, California Rule of Court 2.956(b)(3) requires the clerk to notify the parties "as soon as possible" if an official court reporter will *not* be available for trial. If the court normally does *not* provide an official court reporter at trial, then the court must require the parties to file a statement before trial indicating whether they request an official court reporter, and the court must notify the requesting party "as soon as possible before the trial" if none is available. (See Cal. R. Ct. 2.956(b)(3).) Either way, if no official court reporter is available, the parties may make arrangements for one on their own. (See Cal. R. Ct. 2.956(c).)

Know Your Rights

What should you do when ordered to the bench to address a key point off the record? Or when there is impromptu argument in chambers on an important issue?

Ask for the court reporter to be present.

Every civil litigant has a right to do this. Section 269 of the Code of Civil Procedure states that a court reporter "*shall* take down in shorthand *all* testimony, objections made, rulings of the court, exceptions taken, arraignments, pleas, sentences, arguments of the attorneys to the jury," as well as "statements and remarks made and oral instructions given by the judge or other judicial officer." [emphasis added]. Section 269 applies in all civil cases, either on court order or "at the request of a party." (Cal. Code Civ. Proc. § 269(a)(1).)

Although section 269 does not explicitly require sidebar and in chambers discussions to be reported in every instance (*People v. Pinholster*, 1 Cal. 4th 865, 920 (1992) (dictum)), the statute is nevertheless mandatory ("shall" take down) and comprehensive ("all"

such matters). And it applies as well to every word uttered by the trial court ("all...statements and remarks made ... by the judge or other judicial officer.").

Some lawyers may be reluctant to ask for a court reporter when matters take a turn for the worse. But if the issue is legitimate, discretion is not the better part of valor. "[C]ounsel must make his record for the Court of Appeal at the risk of a measure of annoyance to the trial judge." (*Gasper v. Georgia Pac. Corp.*, 248 Cal. App. 2d 248, 251 (1967).) At any rate, all trial court judges know that litigants have the right to make a record for appeal, and few will take offense as long as the request is made respectfully.

Missed Opportunities

What if an important colloquy ends before you think of requesting a court reporter? All is not lost. At the next break or the next time the jury is excused, go back on the record and summarize completely and accurately what took place. The record should be made as soon as possible. If you wait too long--until the end of trial or even the end of the day--memories might fade, or the entire event might fall through the cracks.

Get Electronic and Audio Recordings Reported

It is not unusual for videotaped deposition testimony, or other video or audio recordings, to be admitted into evidence. Sometimes this kind of evidence does not get reported, and that can lead to difficulties with the record.

In large part this is because court rules don't automatically require the reporting of electronic recordings. The rules state that "[u]nless otherwise ordered by the trial judge, the court reporter need not take down or transcribe an electronic recording that is admitted into evidence." (Cal. R. Ct. 2.1040(b).) Instead, the rules require the party offering into evidence any sound (or sound-and-video) recording to tender a transcript of the recording; the transcript "must be marked for identification" and a copy filed; and it "must be part of the clerk's transcript in the event of an appeal." (Cal. R. Ct. 2.1040(a).)

At a minimum, attorneys should comply with California Rule of Court 2.1040 to ensure that the record includes a written transcript of evidence received electronically, be it a recorded telephone call, a videotaped deposition, or some other recording. But under rule 2.1040, counsel can ask for this evidence to be reported, and in appropriate cases counsel should do so. It may be tempting to try to save money on the front end, or stay on the judge's good side, by not insisting on this. But such a choice might prove penny-wise and pound-foolish. If the case is appealed, appellate justices and their clerks may find it cumbersome to flip back and forth between various components of the record, particularly in larger cases. Lawyers and courts generally read an appellate record like they would a book: chronologically, from start to finish. Imagine reaching the final chapter of *Moby Dick*, only to find that it's located in a separate file!

Failing to have evidence re-reported also carries practical risks. For example, the party proffering the evidence might forget to lodge a substituted transcript, or the parties might disagree about its accuracy. Making the proper record involves some risk analysis, and the level of that risk varies by case and circumstances. In every case, however, the question remains: Is the risk of going without a court reporter worth taking? The answer is usually no.

Evidentiary Rulings

Evidentiary discussions are one common situation in which substantive matters are addressed off the record: during unreported sidebar conferences, for example, or during unreported arguments on motions in limine.

Sometimes this is of no significance, such as when minor evidentiary issues will have no bearing on an appeal. But whenever important--or potentially important--evidence is discussed, a reported record should be made.

The California Evidence Code states, "[a] verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed" due to the erroneous admission or exclusion of evidence, unless the record discloses certain basic information. (See Cal. Evid. Code §§ 353, 354.) If evidence is erroneously admitted, a timely objection or a motion to exclude or strike must be *on the record*; the objection or motion must state the specific ground for excluding the evidence (Cal. Evid. Code § 353(a)). If evidence is erroneously excluded, an offer of proof ordinarily is required. With certain limited exceptions, it must appear "of record" either that "the substance, purpose and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means" or that "[t]he rulings of the court made [such] compliance ...futile." (Cal. Evid. Code § 354.)

Failing to take these basic steps on the record can be fatal to an appeal. For example, in *Wysinger v. Automobile Club of Southern California* (157 Cal. App. 4th 413 (2007)), the court rejected a challenge to a million-dollar punitive damages award in which the defendant made an offer of proof concerning excluded expert testimony but did so only in an unreported sidebar conference. Therefore, whenever an important evidentiary issue arises, either make certain the court reporter is present (at sidebar or in chambers), ask that the jury be excused to permit a discussion on the record, or memorialize the colloquy on the record at the next available opportunity.

Make a Record of Jury Instructions

Arguably, jury instructions are the most crucial part of a trial to put on the record. Properly preserved, instructional error can be a fertile ground for appeal. It presents a pure issue of law: A jury instruction is either right or wrong. If the error was prejudicial, it can be a powerful ground for appellate reversal. But difficulties sometimes arise because the requirements for making a record of instructional error are exacting (and not necessarily intuitive), yet conferences on proposed jury instructions often are not reported.

The record must show who proposed the jury instruction being challenged. If it doesn't, then the appellate court will presume that the appellant did and invited any error. (See *Faulk v. Soberanes*, 56 Cal. 2d 466, 471 (1961), and *Lynch v. Birdwell*, 44 Cal. 2d 839, 846-47 (1955).) The same is true when the trial judge modifies an instruction that the appellant proposed: If the record does not reflect the instruction in the form originally requested, then the appellate court will presume that the appellant acquiesced in the revision. (See *Phillips v. Noble*, 50 Cal. 2d 163, 168-69 (1958).)

Conversely, the trial court's refusal of a re-requested jury instruction must also be in the record. Otherwise, the appellate court will presume the appellant withdrew it (*Huber, Hunt & Nichols, Inc. v. Moore*, 67 Cal. App. 3d 278, 312 (1977)), or that the instruction just got lost in the shuffle (*Bullock v. Phillip Morris, USA, Inc.*, 159 Cal. App. 4th 655, 677-79 (2008)).

To avoid these pitfalls, the first step to take is making sure that proposed instructions are properly prepared and submitted in writing.

(See Cal. Code Civ. Proc. § 607a ("[A]ll proposed instructions shall be *typewritten*, each on a separate sheet of paper." [emphasis added])). Compliance with the formatting requirements for proposed instructions helps make a written record. Among other things, the applicable court rules require a cover page identifying the party proposing the instructions. (See Cal. R. Ct. 2.1055 (b)(2).) The rules also require an index listing the proposed instructions, with a checklist the court "may use" to indicate whether the instruction was given as proposed, given as modified, refused, or withdrawn. (See Cal. R. Ct. 2.1055(b)(3).) "[O]n each requested instruction the trial judge should endorse the fact as to whether it was given or refused or given as modified, with the modification, if any, clearly indicated." (*Lynch v. Birdwell*, 44 Cal. 2d 839, 846-47 (citing *Vaughn v. Jonas*, 31 Cal. 2d 586, 596 (1948))). Submitting properly formatted instructions equips the trial judge with the tools he or she needs to do this. Also, during the instructions conference, counsel should ask the trial judge to mark up the proposed instructions as rulings are rendered.

Still, it is rarely prudent to rely on the written record alone. Contested instructional issues should always be placed on the record as well: Who proposed what, the parties' objections, how the court ruled, and its reasons. It is permissible to do this after the jury has retired to deliberate. (See *Mary M. v. City of Los Angeles*, 54 Cal. 3d 202, 213 n.4 (1991).) But, if possible, this should be done immediately, while memories are fresh. Otherwise, the judge's recollection might differ from counsel's, which could present an obstacle to claiming instructional error on appeal. In one recent instance, for example, the issue was waived when the judge recalled, during a colloquy six hours into jury deliberations, that all parties had agreed to a modified instruction during an unreported conference, even though defense counsel maintained she had not done so. (See *Mayes v. Bryan*, 139 Cal. App. 4th 1075, 1087-90 (2006).)

Making a proper record for appeal doesn't have to be difficult. Understanding where the most frequent hazards lie at trial will help you avoid the most common pitfalls on appeal.

Amy E. Margolin is a director in the Appellate Practice Group at Howard Rice Nemerovski Canady Falk & Rabkin in San Francisco.

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